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In the Supreme Court of the United States

OCTOBER TERM, 1980

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, AND DANIEL B. LEVINE, ACTING DIRECTOR, BUREAU OF THE CENSUS, PETITIONERS

v.

PETER SHAPIRO, ESSEX COUNTY EXECUTIVE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

PETER SHAPIRO, ESSEX COUNTY EXECUTIVE

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QUESTION PRESENTED

Whether lists of addresses collected and utilized by the Bureau of the Census in fulfilling its duties under the Census Act, 13 U.S.C. 1 *et seq.*, are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552.

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The Solicitor General, on behalf of the Secretary of Commerce and the Acting Director of the Bureau of the Census, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The judgment order of the court of appeals (App. A, *infra*, 1a-2a) is not reported. The oral opinion of the district court (App. D, *infra*, 6a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, 1a-2a) was entered on December 1, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Exemption 3 of the Freedom of Information Act ("FOIA"), 5 U.S.C. 552(b)(3), provides:

> [FOIA] does not apply to matters that are—
>
> * * * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]

Section 8(b) of the Census Act, 13 U.S.C. 8(b), provides in pertinent part:

> Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary [of Commerce] may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent * * *.

Section 9(a) of the Census Act, 13 U.S.C. 9(a), provides in pertinent part:

> Neither the Secretary [of Commerce], nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

STATEMENT

On August 12, 1980, respondent filed this suit under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, in the United States District Court for the District of New Jersey. Respondent sought disclosure of the master address register compiled by the Bureau of the Census with regard to Essex County, New Jersey.[1] He alleged that he intended

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[1] The master address register is a spiral-bound book systematically listing, *inter alia*, addresses, householder's names, number of housing units at the street address, type of census inquiry, Bureau of the Census serial number, number of per-

to use these addresses to check the accuracy of the 1980 decennial census in Essex County (App. D, *infra*, 6a-8a, 10a-12a). The government resisted disclosure, claiming that 13 U.S.C. 8(b) and 9(a) prohibit disclosure of all census data pertaining to particular individuals, including addresses, and that therefore the Bureau could lawfully withhold the information pursuant to Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3).

On August 27, 1980, the district court granted respondent's motion for summary judgment. In an oral opinion, the district court held that Sections 8(b) and 9(a) "d[o] not provide a blanket of confidentiality for any and all census materials; instead, the confidentiality requirement is structured solely to require that census material be used in furtherance of the Bureau's statistical mission and to ensure against disclosure of any particular individual's response" (App. D, *infra*, 9a-10a). Because respondent allegedly intended to use the census data in order to participate in the Local Review Program developed by the Bureau in conjunction with the 1980 decennial census,[2] the court concluded that the address list

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sons in each unit, and, where applicable, the vacant status of the unit. Each enumeration district throughout the country has its own master address register. There are approximately 800 enumeration districts in Essex County. The list of addresses included in the master address register is compiled from commercial mailing address lists, census postal checks, preenumeration canvassing by census personnel, and direct inquiries during the census enumeration itself. In some cases, the 1980 lists were also crosschecked against 1970 census data.

[2] The Local Review Program was developed by the Census Bureau to allow local government officials an opportunity to review and comment on the Bureau's population and hous-

is not confidential, at least with regard to respondent. The court also stated (*id.* at 11a-12a) that respondent's intent to use the address list for statistical purposes distinguished this case from *Seymour* v. *Barabba*, 559 F.2d 806 (D.C. Cir. 1977), in which the court of appeals upheld the Bureau's claim of confidentiality regarding similar census data. In addition, the court observed that the address data sought by respondent "is not derived from the questionnaires received, but rather, data available prior to the commencement of the census process" (App. D, *infra*, 12a-13a).

The district court accordingly ordered petitioners to turn over the address list to respondent and his agents, but only after swearing such persons to observe the confidentiality requirements of the Act, in accordance with 13 U.S.C. 23(c). See App. F, *infra*, 17a. The court further directed petitioners to consider any data submitted by respondent within 10 working days of his obtaining the address lists (*ibid.*). Finally, the district court stayed its order pending appeal (App. G, *infra*, 18a).

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ing tabulations before those figures become final. Accordingly, in August and September 1980, petitioners supplied Essex County and its subdivisions with the Bureau's "working figures" (C.A. App. 5). Respondent was thereafter required to submit any data demonstrating inaccuracies or other problems within 10 working days of receipt of the working figures (*id.* at 20-35). Respondent never submitted any data to the Bureau, although localities within Essex County did participate in the Local Review Program. Previously, respondent proposed that the Bureau consider its "disorganized list" of addresses that would have required an inordinate amount of effort to reconcile with the Bureau's master list (App. D, *infra*, 8a-9a; C.A. App. 42-43). ("C.A. App." refers to the appendix filed in the court of appeals.)

On appeal, the court of appeals summarily affirmed "for the reasons stated by the district court" (App. A, *infra*, 2a).[3]

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the confidentiality of the raw data collected by the Bureau of the Census in order to conduct the decennial census. The courts below have held that the Census Bureau's master address register must be disclosed to the public under the Freedom of Information Act, 5 U.S.C. 552, at least where the party requesting disclosure of the data alleges that he intends to challenge the accuracy of the census. That conclusion cannot be reconciled with the language and history of Sections 8(b) and 9(a) of the Census Act, 13 U.S.C. 8(b) and 9(a), and is in conflict with the decision of the District of Columbia Circuit in *Seymour* v. *Barabba*, 559 F.2d 806 (1977). Moreover, because strict confidentiality is essential to ensuring public cooperation with and voluntary participation in the nationwide censuses, and because the confidentiality of census data is the subject of substantial litigation at this time, review by this Court is warranted.

1. The Freedom of Information Act ("FOIA") establishes that a federal agency may not improperly withhold agency records from public disclosure. See

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[3] The court of appeals agreed to stay the district court's order until December 8, 1980 (App. A, *infra*, 2a). In the interim, the government sought a stay of the district court's order from this Court. On December 4, 1980, Justice Brennan granted a stay pending further order (No. A-490). On December 15, 1980, the Court, with two Justices dissenting, continued the stay pending the timely filing and final disposition of a petition for a writ of certiorari.

5 U.S.C. 552(a)(4)(B); *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375, 384 (1980); *Forsham* v. *Harris*, 445 U.S. 169, 177 (1980); *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980). An agency record may be withheld, however, when the requested material falls within one or more of the nine statutory exemptions set forth in 5 U.S.C. 552(b). See *CPSC* v. *GTE Sylvania, Inc.*, No. 79-521 (June 9, 1980), slip op. 18; *FOMC* v. *Merrill*, 443 U.S. 340, 351-352 (1979). This case involves Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), which provides that an agency need not disclose matters that are "specifically exempted from disclosure by statute * * * provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

Sections 8(b) and 9(a) of the Census Act, which govern the confidentiality of census data, unquestionably qualify as Exemption 3 statutes. Section 8(b) provides that, although the Secretary of Commerce may publish aggregate statistical tabulations, he may "not disclose the information reported by, or on behalf of, any particular respondent [to the census]." 13 U.S.C. 8(b). And Section 9(a) confirms that the Secretary and his employees may not "make any publication whereby the data furnished by any particular establishment or individual under this title can be identified" or "permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports." 13 U.S.C. 9(a). Because Sections 8(a) and 9(b) thus establish a flat ban on disclosure of

census data relating to individual persons or establishments, both statutes fall within the plain terms of Exemption 3. *Seymour* v. *Barabba, supra,* 559 F.2d at 807-809. See *CPSC* v. *GTE Sylvania, Inc., supra,* slip op. 18-20.

In any event, the legislative history of the FOIA leaves no doubt that Congress intended Exemption 3 to preserve the confidentiality of census data. Thus, Congress considered "census information" (104 Cong. Rec. 6550 (1958) (remarks of Rep. Moss)) to be privileged and confidential under Section 3 of the Administrative Procedure Act, 5 U.S.C. (1964 ed.) 1002, which, as this Court observed in *EPA* v. *Mink,* 410 U.S. 73, 79 (1973), was the predecessor statute to the FOIA. See also S. Rep. No. 1621, 85th Cong., 2d Sess. 9 (1958); 104 Cong. Rec. 6548-6550 (1958) (remarks of Reps. Brown, Meader, and Moss); *Freedom of Information and Secrecy in Government: Hearing on S. 921 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 85th Cong., 2d Sess., Pt. 2, 986, 1001 (1958). In enacting the FOIA in 1966, Congress completely revised Section 3 of the APA. In doing so, however, Congress was aware that "[t]he Bureau of the Census can only gather the information that it does gather because that information will be held confidential or the sources of information will be confidential." 112 Cong. Rec. 13646 (1966) (colloquy between Rep. Olsen and Rep. Moss, sponsor of the bill). Accordingly, Congress made clear that Exemption 3 "would exempt the Bureau of the Census from" the disclosure requirements of the FOIA. *Ibid.* See also S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); *Freedom of Information: Hearings on*

S. 1666 and S. 1663 (in part) Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 6 (1963).

Furthermore, in 1976, Congress amended the FOIA in light of this Court's decision in *Administrator* v. *Robertson*, 422 U.S. 255 (1975), in order to restrict the scope of Exemption 3.[4] Government in the Sunshine Act, Pub. L. No. 94-409, Section 5(b), 90 Stat. 1247. See H.R. Rep. No. 94-880, 94th Cong., 2d Sess., Pt. I, 22-23, and Pt. II, 14-15 (1976); H.R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. 14 (1976). The pertinent legislative debates, however, again reflect continuing congressional concern that "all census information be kept secret" and that all data collected under "the Census Act, [which] requires the Census Administrators to keep all information secret, * * * will not be subject to disclosure." 122 Cong. Rec. 24211 (1976) (remarks of Rep. McCloskey). In short, as Rep. Abzug, a manager of the bill in the House explained, "confidentiality of the census * * * is protected under" amended Exemption 3. 122 Cong. Rec. 24211 (1976). See also *Seymour* v. *Barabba*, *supra*, 559 F.2d at 808.

2. The courts below nonetheless concluded that respondent is entitled to disclosure of the Bureau's master address list because he allegedly intends to use that list for statistical purposes related to the

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[4] In *Robertson*, the Court concluded that the discretionary nondisclosure provisions of Section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. 1504, constituted an Exemption 3 statute. The 1976 amendment narrowed the scope of Exemption 3 to include only nondisclosure statutes that are nondiscretionary or that specify sufficiently definite criteria for withholding certain kinds of records. The Census Act establishes a non-discretionary ban on the disclosure of all census data relating to particular individuals or establishments and hence falls within 5 U.S.C. 552(b)(3)(A).

accuracy of the 1980 decennial census (App. D, *infra*, 9a-12a; App. A, *infra*, 2a). But a requester's need or proposed use of governmental data is irrelevant as to whether the records in question must be disclosed under the FOIA. See, *e.g.*, *FOMC* v. *Merrill*, *supra*, 443 U.S. at 362-363; *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 n.23 (1978); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10, 149 n.16 (1975); *EPA* v. *Mink*, 410 U.S. 73, 86 (1973). In other words, respondent's right to disclosure of census data pursuant to the FOIA is no greater than the right of any other member of the public. Furthermore, as we now demonstrate, the language and legislative history of the Census Act make clear that census data relating to individual persons or establishments may not be disclosed to any person or governmental agency outside of the Bureau of the Census, regardless of its intended use.

a. Section 8(b) of the Act states unequivocally that the Secretary may publish statistical tabulations based on the underlying census data, but may "not disclose the information reported by, or on behalf of, any particular respondent." 13 U.S.C. 8(b). Section 9(a), in turn, imposes additional limitations on the use and publication of census data, specifically prohibiting (1) the use of census data for noncensus purposes, (2) the publication of census material in a fashion that could identify the data supplied by any particular establishment or individual, and (3) the inspection of census reports by persons other than the sworn personnel of the Bureau. See 13 U.S.C. 9(a).[5] These sweeping provisions prohibit the dis-

[5] All Bureau employees must be sworn to observe the confidentiality provisions of the Act. See 13 U.S.C. 9, 23(c). Violation of these provisions is subject to substantial criminal penalties. See 13 U.S.C. 214.

closure of the master address register sought by respondent. See *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 215-218 (1961); *Seymour* v. *Barabba*, *supra*, 559 F.2d at 807-808; 36 Op. Att'y Gen. 362 (1930).

As respondent concedes (Mem. in Opp. to the App. for a Stay at 3 n.*), the master address register contains substantial confidential information regarding individual persons and establishments, including names, number of housing units and persons per household at each address, the vacant or occupied status of each unit, and the manner in which the census information was obtained for a particular address (C.A. App. 38, 42). See note 1, *supra*. Furthermore, even if the master address register could readily be redacted to produce a bare list of addresses,[6] disclosure of that list would run afoul of both the letter and spirit of Sections 8(b) and 9(a). Many addresses are added to the master address register solely as the result of responses by individuals to census inquiries. In addition, publication of a list of addresses would reveal various unlawful or untaxed dwellings, *e.g.*, the occupancy of "abandoned" dwellings or the residential use of lofts zoned only for commercial purposes.[7] Disclosure of such information,

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[6] We are informed that a list of addresses could be culled from the master address register only by copying the thousands of pages constituting the master address register and by manually redacting the substantial amount of information found over much of each page of the register.

[7] Accordingly, respondent's contention that "[t]here is nothing confidential about a list of street numbers" (Mem. in Opp. to the App. for a Stay at 3) is without merit. In any event, Sections 8 and 9 of the Act broadly refer to all census

particularly to the local government, would inevitably result in a decline in the candor and cooperation so essential to the census process.

The conclusion of the courts below that the master address list should nevertheless be disclosed under the FOIA apparently rests on Section 9(a)(1) of the Census Act. That provision states that Census Bureau personnel may not "use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied." 13 U.S.C. 9(a)(1). The district court's oral opinion, which was summarily affirmed by order of the court of appeals, suggests that respondent's intended use of the census data is a "statistical purpose[] for which it is supplied." See App. D, *infra*, 8a-13a; App. A, *infra*, 2a. But Section 9(a)(1) plainly limits the use of census data to *Bureau* personnel for the *Bureau*'s own statistical purposes, not the statistical purposes of a local governmental official or other person seeking to challenge the accuracy of the census.[8] Moreover, all use and publica-

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data and information regarding any individual or establishment and not just information that may be embarrassing or private in nature.

[8] Respondent argues that he needs the address list to participate meaningfully in the Local Review Program created by the Census Bureau to aid in the 1980 decennial census. That program, as noted above (see note 2, *supra*), permits local governments to submit data in useful form to the Bureau. It does not and could not authorize the Bureau to submit raw census data to the local governments. Moreover, the program was created not by statute but by the Census Bureau itself, and the program contains no provision for "discovery" to allow local governments more "meaningful" participation than the Bureau has chosen to provide. We further note that

tion of census data authorized by Section 9(a) is expressly subject to the flat ban set forth in Section 8(b) regarding the disclosure of any "information reported by, or on behalf of, any particular respondent" to the census. See 13 U.S.C. 9(a) ("except as provided in Section 8 of this title").[9]

b. The legislative history of the Census Act confirms that the master address register or any other census information pertaining to individual persons or establishments is not subject to disclosure. The initial census statutes required the public posting of the actual census schedule of results in each district.

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although several thousand localities, including jurisdictions within Essex County, participated in the Local Review Program without inspecting the Bureau's address registers, respondent failed to submit timely and useful information to the Bureau as required by the Local Review Program guidelines (C.A. App. 42-43, 51-52).

[9] The district court attempted to circumvent the plain language of Sections 8(b) and 9(a) by directing the Bureau to deputize respondent's employees as sworn officers of the Bureau and by ordering petitioners to consider as timely under the Local Review Program any submission by respondent following his inspection of the address registers (App. F, *infra*, 17a). It is doubtful whether the FOIA, which was enacted to permit unfettered public disclosure of nonexempt agency records (see *CPSC* v. *GTE Sylvania, Inc.*, *supra*, slip op. 6), authorizes the district court to order such extraordinary relief. See *Kissinger* v. *Reporters Committee for Freedom of the Press*, *supra*, 445 U.S. at 154. But cf. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 16-20 (1974); *Getman* v. *NLRB*, 450 F.2d 670 (D.C. Cir. 1971). It is inconceivable, for example, that under the FOIA a district court could order the CIA to "deputize" a member of the public in order to allow limited inspection of national security secrets. In short, we submit that the district court's protective order reflects the confidential nature of the census data that respondent seeks to inspect.

See Act of Feb. 28, 1800, ch. 12, Section 7, 2 Stat. 13; Act of Mar. 26, 1810, ch. 17, Section 7, 2 Stat. 567-568; Act of Mar. 14, 1820, ch. 24, Section 7, 3 Stat. 552. Subsequently, however, Congress reacted to the public's apparent concern over the general disclosure of census data (see, *e.g.*, S. Misc. Doc. No. 41, 41st Cong., 2d Sess. (1870)), and, in 1879, it directed each enumerator to take an oath "not [to] disclose *any information* contained in the *schedules*, *lists*, or statements" used in the decennial census. Act of Mar. 3, 1879, ch. 195, Section 7, 20 Stat. 475 (emphasis supplied). See, *e.g.*, Act of Mar. 1, 1889, ch. 319, Section 8, 25 Stat. 763; Act of Mar. 3, 1899, ch. 419, Sections 7, 18, and 21, 30 Stat. 1015, 1019, 1020.

Morever, since 1879, both Congress and the executive officials responsible for conducting the census have repeatedly and uniformly expressed the view that all raw census data, including lists and schedules containing any information about an individual person or establishment, must be kept strictly confidential. Thus, Section 25 of the Act of July 2, 1909, ch. 2, 36 Stat. 9, the predecessor to Section 9(a) of the current Act, provided that "[n]o publication shall be made by the Census Office whereby the data furnished by any particular establishment can be identified, nor shall the Director of the Census permit anyone other than the sworn employees of the Census Office to examine the individual reports." And the House Report accompanying the 1909 version of the Census Act reflected with clarity Congress' understanding that complete confidentiality of "all schedules and other information officially obtained" was essential to the vitality and efficacy of the census. H.R. Rep. No. 960, 60th Cong., 1st Sess. 5 (1908). See also, *e.g.*, *id.* at 23; 36 Op. Att'y Gen. 362 (1930).

In revising and amending the census laws on several occasions since 1909, Congress has continued to preserve and to strengthen the appearance and fact of confidentiality that is essential to the census process. See, *e.g.*, Act of Apr. 2, 1924, ch. 80, Section 3, 43 Stat. 31; Act of June 18, 1929, ch. 28, Sections 8 and 21, 46 Stat. 23, 26; Act of July 25, 1947, ch. 331, Section 3, 61 Stat. 458; Act of Aug. 31, 1954, ch. 1158, 68 Stat. 1013-1014; S. Rep. No. 2497, 83d Cong., 2d Sess. 2, 10 (1954); H.R. Rep. No. 1980, 83d Cong., 2d Sess. 10 (1954). In 1962, for example, Congress promptly overruled this Court's decision in *St. Regis Paper Co.* v. *United States*, *supra*, which had held that a copy of a census report retained by a business establishment was not immune from judicial process. See Act of Oct. 15, 1962, Pub. L. No. 87-813, 76 Stat. 922. The pertinent Senate Report observed that the amendment was necessary "to clarify[] the intent of the Census Act in order to provide the protection of confidentiality" that is "vital to its effectiveness." S. Rep. No. 2218, 87th Cong., 2d Sess. 2, 4 (1962).

More recently, Congress has repeatedly acknowledged that the Census Act establishes a blanket prohibition on the publication or disclosure of any census information other than statistical tabulations. In addition to the legislative history of the FOIA described above (pages 7-8, *supra*), Section 3(b)(4) of the Privacy Act of 1974, 5 U.S.C. 552a(b)(4), and the legislative history accompanying the Privacy Act evidence this point. Section 3(b)(4) states that the Privacy Act does not prohibit the dissemination of records regarding any individual to the Bureau of the Census. The congressional reports explain that such dissemination does not interfere with individual privacy because the census "laws prohibit publication

of data gathered by the Bureau in identifiable form and strictly govern confidentiality." S. Rep. No. 93-1183, 93d Cong., 2d Sess. 70 (1974). See, *e.g.*, *id.* at 5, 12; H.R. Rep. No. 93-1416, 93d Cong., 2d Sess. 3, 12-13, 25 (1974); *Sale or Distribution of Mailing Lists By Federal Agencies: Hearings on H.R. 8903 and Related Bills Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess. 38, 62-63 (1972); *Special Inquiry on Invasion of Privacy: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess., Pt. 1, 276, 283, 284-286 (1965).

Finally, the 1976 amendment to the Census Act itself squarely refutes respondent's contention that the Bureau's master address register is not covered by the confidentiality provisions of the Act. At that time, Congress amended Section 8 "to add further protection of privacy." S. Rep. No. 94-1256, 94th Cong., 2d Sess. 3 (1976). See Act of Oct. 17, 1976, Pub. L. No. 94-521, Section 6, 90 Stat. 2460. The Senate Report explains that Section 8, as amended, "ensures that the authority of the Secretary of Commerce to furnish statistical tabulations or other material to *public* and private *entities* does not extend to any material which *might* disclose information reported by, or on behalf of, any respondent." S. Rep. No. 94-1256, *supra*, at 4 (emphasis added). See H.R. Conf. Rep. No. 94-1719, 94th Cong., 2d Sess. 10-11 (1976). Congress thus did not intend to give public entities such as Essex County any greater right of access to census data than any other member of the public.[10] In

[10] Indeed, not even other federal agencies, including the FBI, have access to census data such as the master address register. See H.R. Rep. No. 93-1416, *supra*, at 12-13; 36 Op. Att'y Gen. 362 (1930).

addition, it is apparent that the master address register constitutes census "material which might disclose information reported by, or on behalf of," Essex County residents. In sum, the decision below egregiously misconstrues the confidentiality provisions of the Census Act.[11]

3. The erroneous decision of the court of appeals is squarely at odds with the decision of the District of Columbia Circuit in *Seymour* v. *Barabba*, *supra*. In *Seymour*, the court of appeals held that "names and *addresses* * * * utilized by the Bureau of the Census in fulfilling its duties under the federal census laws are specifically protected from disclosure by Exemption 3 of the Freedom of Information Act and the relevant provisions of the census laws." 559 F.2d at 807 (emphasis added; footnote omitted). In contrast to the court below, the District of Columbia Circuit carefully reviewed the language and legislative history of both the FOIA and the Census Act, and it concluded that Sections 8(b) and 9(a) of the Act constitute "a flat barrier to disclosure with no exercise of discretion permitted." 559 F.2d at 808. Compare also *City of Hobbs* v. *Klutznick*, No. 80-792-JB (D.N.M. Nov. 17, 1980) (census address lists

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[11] Particularly in light of Congress' repeated approval of and acquiescence in the Bureau's view that its list of "addresses * * * c[o]me[s] under the protection of the confidentiality provisions of section 9, title 13" (*Hearings on H.R. 8903*, *supra*, at 212), the court of appeals should have deferred to the agency's longstanding and consistent administrative interpretation. See, *e.g.*, *EPA* v. *National Crushed Stone Ass'n*, No. 79-770 (Dec. 2, 1980), slip op. 18-20; *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 595-596 (1980); *Board of Education* v. *Harris*, 444 U.S. 130, 148-149 (1979).

held confidential), with *McNichols* v. *Klutznick*, No. 80-C-1151 (D. Colo. Sept. 17, 1980) (address lists not confidential), appeal pending, No. 80-2023 (10th Cir.), and *Carey* v. *Klutznick*, No. 80 Civ. 4550 (S.D.N.Y. Dec. 29, 1980), appeal pending, No. 81-6042 (2d Cir.) (same).

The district court suggested (App. D, *infra*, 11a) that *Seymour* is distinguishable because in that case the FOIA requester sought the address list for commercial purposes, whereas here respondent seeks similar data for "statistical" purposes. But we have previously explained that the Census Act establishes "a flat barrier to disclosure" (559 F.2d at 808) and that the identity of an FOIA requester is irrelevant to the exempt nature of the requested material. See page 9, *supra*. Section 9(a)(1) of the Census Act prohibits the use of census data by Bureau personnel except for *the Bureau's* statistical purposes in fulfilling its statutory responsibility, and does not purport to permit any public disclosure whatsoever. Likewise, the district court erroneously indicated that the master address register is not confidential because "the information being sought is not derived from the questionnaires received, but rather, data available prior to the commencement of the census process" (App. D, *infra*, 12a-13a). In fact, however, many addresses are added to the master register as the result of individual responses to census inquiries both prior to and during the actual enumeration process. Furthermore, the D.C. Circuit correctly determined in *Seymour* that the fact that portions of the Bureau's lists of "addresses are acquired or supplied from sources other than the specific reporting establishments" is simply irrelevant to the disclosure question involved in this FOIA case. See 559 F.2d at 808-809.

4. As this Court has recognized, strict confidentiality of census data is essential to ensure public cooperation with and voluntary participation in the nationwide census. *St. Regis Paper Co.* v. *United States, supra*, 368 U.S. at 218. See also *Seymour* v. *Barabba, supra*, 559 F.2d at 808; *Heathman* v. *United States District Court*, 503 F.2d 1032, 1036-1037 (9th Cir. 1974) (Chambers, J., concurring); *LaMorte* v. *Mansfield*, 438 F.2d 448, 452 (2d Cir. 1971); *FTC* v. *Dilger*, 276 F.2d 739, 744 (7th Cir.), cert. denied, 364 U.S. 882 (1960); *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568, 569-570 (S.D.N.Y. 1958). The decision below, if left standing, will breach the Bureau's longstanding and unequivocal promise of confidentiality and will frustrate the congressional intent underlying Sections 8 and 9 of the Census Act. As a result, the constitutionally and statutorily mandated collection of accurate census data, which is already a difficult, expensive, and time-consuming process, may be substantially impeded.

Moreover, the important issue of the confidentiality of census data is a recurring one. In addition to the conflict among the lower courts described above (see pages 16-17, *supra*), the Bureau's construction of Sections 8 and 9 of the Census Act is currently being challenged in various other cases across the country. See, *e.g.*, *City of Philadelphia* v. *Baldrige*, No. 80-3172 (E.D. Pa. Dec. 5, 1980), appeal pending, No. 80-2785 (3d Cir.); *Holland* v. *Baldrige*, No. 80-73302 (E.D. Mich.); *State of New Mexico* v. *Baldrige*, No. 80-0726-C (D.N.M.); *County of Dona Ana* v. *Baldrige*, No. 80-676 (D.N.M.). Accordingly, review by this Court is warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

ANDREW J. LEVANDER
Assistant to the Solicitor General

LEONARD SCHAITMAN
MICHAEL KIMMEL
Attorneys

FEBRUARY 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2466

SHAPIRO, PETER, Essex County Executive

vs.

KLUTZNICK, PHILIP M., Secretary, U.S. Department of Commerce, and VINCENT P. BARABBA, Director, U.S. Bureau of the Census, APPELLANTS

Appeal from the United States District Court
for the District of New Jersey

(D.C. Civil No. 80-02638)

Argued December 1, 1980

Before: ALDISERT, HUNTER and HIGGINBOTHAM, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed generally for the reasons stated by the district court, Supplemental Appendix 1-12. The mandate of the court shall issue December 8, 1980.

Costs taxed against appellants.

BY THE COURT

/s/ R. J. Aldisert

Circuit Judge

Attest:

/s/ Sally Mrvos
SALLY MRVOS
Clerk

Dated: Dec. 1, 1980

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

November 6, 1980

No. 80-2466

SHAPIRO, PETER, Essex County Executive

vs.

KLUTZNICK, PHILIP M., Secretary, U.S. Department of Commerce, and VINCENT P. BARABBA, Director, U.S. Bureau of the Census, APPELLANTS

Present: ALDISERT, HUNTER and HIGGINBOTHAM, *Circuit Judges.*

1. Motion by appellants for reconsideration of this Court's order dated October 31, 1980.
2. Copy of this Court's order dated October 31, 1980, sent by the undersigned for the Court's information,

in the above-entitled case listed for disposition on the merits on Monday, December 1, 1980.

Respectfully,

/s/ Sally Mrvos
Clerk

ngp
enc.

The foregoing Motion is denied.

By the Court:

/s/ Aldisert
Judge

Dated: November 24, 1980

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

October 27, 1980

No. 80-2466

SHAPIRO, PETER, Essex County Executive

vs.

KLUTZNICK, PHILIP M., Secretary, U.S. Department of Commerce, and VINCENT P. BARABBA, Director, U.S. Bureau of the Census, APPELLANTS

(D.C. Civil No. 80-2638)

Present: ALDISERT, HUNTER and HIGGINBOTHAM, *Circuit Judges.*

1. Motion by appellee to vacate stay of the district court order dated October 21, 1980, and compel the Bureau of Census to allow immediate access to its street address data under the terms of the trial court's order, *or, alternatively,* to order a conference between the parties for adoption of the data-sharing plan pending determination of the appeal,

in the above-entitled case listed for disposition on the merits on Monday, December 1, 1980.

Respectfully,

/s/ Sally Mvros
Clerk

mgp
enc.

The foregoing Motion to vacate stay is GRANTED.

By the Court:

/s/ Aldisert
Judge

Dated: October 31, 1980

APPENDIX D

[Oral Opinion of the United States District Court for the District of New Jersey Dated Aug. 27, 1980]

* * * *

THE COURT: As I have just stated both parties have requested that the Court treat this matter as a cross motion for summary judgment and because of the important time limitation imposed upon the County I am prepared to do that.

This is an action to compel disclosure of the address lists used by the Bureau of the Census, Department of Commerce, for delivery of the 1980 Census Forms in Essex County, New Jersey.

A Freedom of Information Act Request for this information was made and denied.

The Bureau of the Census has developed a list of addresses in connection with the 1980 Census from commercial mailing lists, postal lists and other sources.

The list had been used to mail and otherwise deliver the 1980 Census forms in Essex County.

Plaintiff contends that to the extent the Bureau's list omits addresses the Bureau may have failed to count housing units and residents which may in turn result in an unjustified but substantial loss of funds to local Governments and a diminution and crippling of essential public programs, and because Congressional and Legislative apportionment also depends on Census results, an under-count may also result in an unjustified loss of representation for County residents.

Because of past disputes over the accuracy of its count the Bureau has instituted a program of local review. The program gives local Government officials ten working days to provide the Bureau with data

challenging the accuracy of preliminary housing and head counts.

Receipt of the preliminary counts from the Bureau triggers the start of a ten day period. The preliminary data for Newark was received on August 1st, 1980. That preliminary data apparently shows a loss of more than 70,000 residents since 1970.

Unless this loss of population is successfully contested it may mean a loss of millions of dollars annually in Federal Benefits for the County and the city.

Data for the remainder of the County is expected to be received sometime in the next two weeks. In order to be able to participate in the local review process, Essex County alleges that it has developed its own comprehensive list of addresses. The list was developed from municipal tax records and is alleged to contain every street address in the County.

The list was prepared to enable the Counties to determine whether the Bureau's list of addresses is sufficient.

Plaintiff contends that unless the County gains access to the Bureau's list its own list is worthless and the County will be unable to participate in a meaningful [*sic*] in the local review process.

The Bureau refuses access to its address register on the grounds of confidentiality.

Plaintiff does not seek access to individual Census Reports nor information relative to particular individuals.

In reaching its decision in this matter the Court has considered all of the affidavits which were submitted and in particular the following excerpts:

Mr. Nick Koval is a planner in the Division of Planning, Department of Planning and Economic Development, County of Essex, he was chiefly respon-

sible for compiling a list of street addresses in Essex County to be used in conjunction with the Census.

I quote from his affidavit, paragraph 4:

"The Bureau refuses to use our tax records to compile its address list. We offered to make our records available for that purpose in the fall of 1979 when the Bureau was in the process of compiling its list."

Quoting from paragraph 5:

"We intend to use the Bureau's address solely in order to determine whether the Bureau missed addresses already known to us. We can make that determination by having a computer read the County's list and the Bureau's list and divulge only those addresses that do not appear on the Bureau's list." The Court also considered the affidavit of Mr. George E. Hall, who is an associate director for Demographic Fields, U.S. Bureau of Census.

In paragraph 2C the following appears:

"In urban areas of the United States the 1980 Census was conducted by a mail out-mail back procedure. Registers are maintained of all addresses to which a form was mailed.

If by mid April a form had not been returned and that fact noted in the address register an enumerator was assigned to follow-up that address.

Later on in his affidavit Mr. Hall identifies the list of addresses as the master address register."

The Court also considered specifically the affidavit of Donald R. Dwyer, a survey statistician in the Census Division, Bureau of the Census. I quote from paragraph 4 of his affidavit:

"While it is theoretically possible to reconcile Essex County's entire disorganized list with the Bureau's address registers, the burden on the Bureau would be untenable, the cost would be large and

the time spent by the limited Census staff would seriously distract them from their duties related to completing the census."

I note, however, that it appears that the County is prepared to undertake that analysis and does not at least at this time request that the Bureau do so. In enacting the Freedom of Information Act Congress sought to promote broad public access for information within the control of the Government; EPA v. Mink, 410 U.S. 73 (1973).

In the instant case plaintiff seeks to enforce his rights pursuant to the Administrative Procedures Act, 5 USC section 552(a), to compel disclosure by the Bureau of the Census of address registers used by the Bureau in conducting its 1980 decennial census.

Consistent with the public policy favoring disclosure rather than secrecy plaintiff's request must be granted unless the information falls within one of the nine statutory exemptions to disclosure; Department of the Air Force v. Rhodes [*sic*], 425 US 352, 1976.

Defendants assert that the information sought by plaintiff falls within an exemption to the Freedom of Information Act authorizing non-disclosure of materials which are specifically exempted from disclosure by statute; 5 US Code section 552(a) 6-C, D3; in other words, the defendant takes the position that the act does not require disclosure if there is a specific statute which prohibits such disclosure, and in that respect the defendant relies upon Title 13.

Title 13, however, does not provide a blanket of confidentiality for any and all census materials; instead, the confidentiality requirement is structured

solely to require that census material be used in furtherance of the Bureau's statistical mission and to ensure against disclosure of any particular individual's response. 13 US Code section 9 requires that the Bureau not "use information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied or make any publication whereby the data furnished by any particular establishment or individual under this title can be identified, or, 3, permit anyone other than the sworn officers and employees of the Department or Bureau or agency thereof to examine the individual's reports."

Plaintiff does not seek an access to individual reports nor does he seek access to any information that would identify the data furnished in a particular report by a particular individual. Plaintiff seeks data exclusively for statistical purposes in conjunction with the Bureau's own program of local review.

Furthermore, with respect to material which is specifically exempted from disclosure the secretary is authorized pursuant to 13 USCA section 23 (c) to utilize County employees in performing its work provided such employees are sworn to observe the limitations of the statute.

In the instant case the Bureau of the Census has established a local review program to assist it in developing its data. Plaintiff's request for the address registers utilized by the Bureau in its furtherance of its participation in this program.

By comparing a mailing list used by the Bureau with its own comprehensive list the County will be able to identify missed buildings and ultimately missed individuals in the Census count.

Without this list the County would be unable to provide the hard data necessary to challenge the Bureau count.

The Bureau's refusal to release the requested information appears to be based on a Circuit Court opinion in Seymour v. Barabba, 559 Fed. 2d, 806, DC Circuit 1977.

Unlike the instance case plaintiff in Seymour was not seeking disclosure for statistical purposes; rather, plaintiff there sought names and addresses for the purposes of sending notice to potential class members in an anti-trust action.

Moreover, the plaintiff sought disclosure not just of addresses but of names and addresses of companies which the Bureau had placed in twenty-one substantive categories. These categories described the business of the firms listed and, hence, obviously reflected the information provided by the company in their census reports.

The confidentiality provisions of Title 13 were enacted to encourage citizens to submit freely all data desired in recognition of its importance in the enactment of laws and other purposes in the national interest; U.S. v. Thesela Hems Field Corporation [*sic*], 21 FRD 568, SDNY 1958.

The disclosure of such lists as requested in this matter for statistical purposes does not reach the disclosure of the confidentiality provisions of Title 13.

Furthermore, by claiming confidentiality for such materials the Bureau of the Census impedes the goal of accurate and complete enumeration which the confidentiality provisions were designed to further.

Unless the County is able to compare its address lists with those used by the Bureau of the Census it will be unable to pinpoint discrepancies arising from this address.

The Court finds that rather than violating the statute, submission of the requested information carries out the policies and purposes of the legislation; the information is not being sought for any purposes other than to verify facts and aid in the accuracy of the census.

The system of local review would be rendered meaningless if this type of information were not made available. And in that respect I would like to quote from an exhibit which was offered in this matter prepared by the United States Department of Commerce, Department of the Census. It is the information booklet pertaining to the local review program.

"The local review program is one of several Census Bureau efforts especially designed to improve the completeness and the accuracy of the 1980 Census. Its purpose is to allow for the review of population and housing counts by local Government officials before the count becomes final and while Census District Offices are open and able to check reported discrepancies. Local review is aimed at improving the accuracy of the census by helping to pinpoint such major problems as clusters of missed housing units, geographic misallocations resulting in housing units or group quarters being recorded in an incorrect location or incorrectly located geographic boundaries. It is hoped that most local areas will have their own data on the number of housing units and estimate for the institutional population in the community and its sub-areas to compare with the census count."

As I have said, that comes right from the Bureau's own brochure on the purpose of the local review program.

Furthermore, the Court finds that the information being sought is not derived from the questionnaires

received, but rather, data available prior to the commencement of the census process. Counsel for the Government suggests that some additional information is now contained on the master address list but that in no way changes the Court's determination.

The goal of plaintiff's request is to furnish to defendant information that it does not have, rather than make use of information that the Bureau has acquired. No information is sought which does not have a statistical purpose.

According to defendant's own brief the principal responsibility of the Bureau is the compilation of comprehensive current and reliable data. One wonders why the Bureau, rather than the County, is not the applicant in this matter.

In commenting on a similar matter in New York The New York Times in an editorial said the following:

"Both sides are after the same thing: The most accurate possible tabulation of the population. Then what are they doing in Court? Why aren't they working together to attain their shared goals?"

And this Court asks the same question.

Accordingly, an order will be entered directing the Bureau to make available to the plaintiff the address register of all properties located in Essex County with this proviso: That all persons utilizing said records shall take the oath of confidentiality prescribed in the statute.

I suggest counsel submit a form of order.

* * * *

APPENDIX E

[Excerpt of Transcript of Hearing on Sept. 22, 1980, in the United States District Court for the District of New Jersey, pp. 8-10]

* * * *

THE COURT: Let me tell you what my ruling would be on your application for additional relief. I would grant your application for a technical description of the Bureau's computerized data as well as the data on the number and organization of addresses on the Bureau's non-computerized updates and the Bureau's master address register, and I say that for the following reason:

If there is anyway that the comparison could be completed without reference to anything other than the address information that the Bureau has, that would be the Court's first preference, therefore, the furnishing of this information might make such a comparison possible and probable.

I will not permit at this juncture any depositions, particularly not pending the appeal.

MR. WEISTREICH: Thank you, Judge.

THE COURT: You have a third item, access to the Bureau's computerized addresses and non-computerized updates. I think that follows number one as well; in other words, we never got to the technical method of making the comparison, but I think that whatever could be done particularly by cooperation which would avoid even access to anything other than the addresses ought to be accomplished and to the extent that the Census Bureau could give you the preliminary outline of what they have I think that would carry out the purpose.

MR. WEISTREICH: I think that was implicit in your Honor's order, it was just the way the order was prepared, it was written in terms of access solely to master—I wanted to make it clear that the access was to the substantive information.

THE COURT: I recall that someone urged if you had the use of the computer tapes the matter could be programmed so that the County's tapes and the Census tapes could be compared and what they would do as a result would specify those addresses that were in the possession of the County and not the Census and that information would be turned over and that was the ultimate goal of this whole procedure.

MR. WEISTREICH: Absolutely correct.

THE COURT: By doing that no one will have the opportunity to look at anything other than the addresses themselves.

* * * *

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 80-2638

PETER SHAPIRO, Essex County Executive,
PLAINTIFF

v.

PHILIP M. KLUTZNICK, Secretary
U.S. Department of Commerce,

VINCENT P. BARABBA, Director,
U.S. Bureau of the Census,
DEFENDANTS

ORDER OF JUDGMENT

This matter being opened to the Court on Complaint of Peter Shapiro, for an Order directing the Bureau of the Census to permit access to its list of street address for Essex County pursuant to the Freedom of Information Act; and the Court having heard the argument and considered the evidence presented by the parties on their cross-motions for summary judgment, Robert Westreich, Esq., appearing for plaintiff and G. Donald Haneke, Assistant U.S. Attorney, appearing for defendants; and for good cause shown, and for the reasons expressed by the Court in its oral opinion rendered August 28, 1980;

IT IS, on this 29 day of Aug., 1980,

ORDERED AND DECLARED by way of Final Judgment that:

1. Defendants shall make available to plaintiff and his agents the Bureau's Master Address Register for use in connection with the Local Review Program;

2. Any person granted access to the Master Address Register pursuant to this Order shall be sworn pursuant to 13 USC § 23(c);

3. Any data developed by plaintiff as a result of access to the Master Address Register and submitted to the Bureau within ten working days after access is obtained, shall be used and considered by the Defendants as though such data were timely submitted pursuant to the Local Review Program.

/s/ H. Lee Sarokin
H. LEE SAROKIN
U.S.D.J.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 80-2638

PETER SHAPIRO, Essex County Executive,
PLAINTIFF

vs.

PHILIP M. KLUTZNICK, Secretary
U.S. Department of Commerce,

VINCENT P. BARABBA, Director,
U.S. Bureau of the Census,
DEFENDANTS

CONSOLIDATED ORDER

This matter being opened to the Court on motion of the Defendants for reargument, alteration of the judgment, and a stay pending appeal; and on motion of Plaintiff for additional relief and discovery, G. Donald Haneke and Anne Singer, Assistant U.S. Attorneys appearing for Defendants, and Robert Westreich, Assistant County Counsel appearing for Plaintiff; and the Court having heard argument, and for the reasons expressed by the Court in its oral opinions of September 11th and September 22, 1980,

IT IS, on this 21 day of October, 1980,

ORDERED THAT:

1. The Court's Order of August 29, 1980, is hereby stayed pending appeal including ¶ 4, 5 & 6 hereof;

2. The period of the stay shall not otherwise limit or prejudice the rights granted to Plaintiff pursuant to the Order of August 29, 1980.

3. The Defendants shall, within seven (7) days of the date of this Order, file a motion with the Court of Appeals for the Third Circuit, to expedite the hearing of this matter;

4. Access to street address records shall include access to the Defendants' computerized records in addition to the Master Address Registers. Any street address records disclosed to Plaintiff and his agents shall, to the full extent possible, be edited to permit disclosure solely of street address data.

5. Plaintiff and his agents shall use the address data produced solely for the purposes of the Local Review Program. Such data shall not be used or disclosed to any other person for any other purpose whatsoever, and the Defendants shall have the right to monitor Plaintiff's use of such data.

6. Within 7 days of the date of this Order, the Defendants shall provide Plaintiff with the following:

a. The technical data needed to read and utilize the Bureau's computerized street address records;

b. Data on the number and organization of those Essex County street addresses which do not appear in the Bureau's computerized records; and

c. Data on the number and organization of street addresses in the Bureau's Master Address Register for Essex County.

7. In all other respects, the Defendants' motion for reargument and alteration and the Plaintiff's motion for discovery and additional relief are denied.

/s/ H. Lee Sarokin
H. LEE SAROKIN
U.S. District Judge

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